

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

SILVIO HERNANDEZ, ) NO. CV 08-05956-DDP (VBK)  
Petitioner, )  
v. ) ORDER (1) ACCEPTING AND ADOPTING  
DEBRA DEXTER, ) THE AMENDED REPORT AND  
Respondent. ) RECOMMENDATION OF THE UNITED  
 ) STATES MAGISTRATE JUDGE, AND (2)  
 ) DISMISSING THE PETITION FOR WRIT  
 ) OF HABEAS CORPUS  
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Pursuant to 28 U.S.C. §636, the Court has made a de novo review of the Petition for Writ of Habeas Corpus ("Petition"), Respondent's Motion to Dismiss, Petitioner's Opposition, Respondent's Supplemental Brief, Petitioner's Reply to Respondent's Supplemental Brief, Petitioner's Objections to the Report and Recommendation, all of the records herein and the Amended Report and Recommendation of the United States Magistrate Judge ("Amended Report").

**IT IS ORDERED** that: (1) the Court accepts and adopts the Amended Report and Recommendation, (2) Respondent's Motion to Dismiss is granted; (3) the Court declines to issue a Certificate of

1 Appealability ("COA");<sup>1</sup> and (4) Judgment be entered dismissing the  
2 Petition with prejudice.



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4 DATED: April 9, 2010

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7 DEAN D. PREGERSON  
8 UNITED STATES DISTRICT JUDGE  
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15       <sup>1</sup> Under 28 U.S.C. §2253(c)(2), a Certificate of Appealability  
16 may issue "only if the applicant has made a substantial showing of the  
17 denial of a constitutional right." Here, the Court has adopted the  
18 Magistrate Judge's finding and conclusion that the Petition is time-  
19 barred. Thus, the Court's determination of whether a Certificate of  
20 Appealability should issue here is governed by the Supreme Court's  
21 decision in Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595 (2000),  
22 where the Supreme Court held that, "[w]hen the district court denies  
23 a habeas petition on procedural grounds without reaching the  
24 prisoner's underlying constitutional claim, a COA should issue when  
25 the prisoner shows, at least, that jurists of reason would find it  
26 debatable whether the petition states a valid claim of the denial of  
a constitutional right and that jurists of reason would find it  
debatable whether the district court was correct in its procedural  
ruling." 529 U.S. at 484. As the Supreme Court further explained:

27       "Section 2253 mandates that both showings be made before the  
28 court of appeals may entertain the appeal. Each component  
of the § 2253(c) showing is part of a threshold inquiry, and  
a court may find that it can dispose of the application in  
a fair and prompt manner if it proceeds first to resolve the  
issue whose answer is more apparent from the record and  
arguments." Id. at 485.

29 Here, the Court finds that Petitioner has failed to make the  
requisite showing that "jurists of reason would find it debatable  
whether the district court was correct in its procedural ruling."